

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 149 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements? -
 2. To be referred to the Reporter or not? Yes. :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? -
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? -
 5. Whether it is to be circulated to the Civil Judge? : NO
-

PATEL SHAMJIBHAI LADHABHAI

Versus

HEIRS OF AMBALAL R.SURA- CHANDRAVADAN A.SURA,SINCE

Appearance:

MR MD PANDYA for Petitioner

MR MD RANA for Respondent No. 1

NOTICE SERVED for Respondent No. 4

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision:-10/05/2000

ORAL JUDGEMENT

1. This appeal has been preferred against dismissal of Regular Civil Suit No. 134/78 by the judgment and decree dated 6-3-1982 passed by the Civil Judge (JD), Modasa which has been confirmed by the District Judge, Himatnagar, dismissing Appeal No. 20/82 filed by the

appellant vide his judgment and decree dated 27-8-1982.

2. The Civil Proceedings, tenancy proceedings, and land acquisition proceedings had taken place between the parties and at the present time, I am concerned with the civil proceedings which have taken between parties. The appellant filed possessory suit being Suit No. 12/57 against the respondents before the Mamlatdars' Court u/s 5 (2) of the Mamlatdars' Courts Act, 1906. The appellant apprehended about obstruction and disturbance in possession over the suit land and hence he filed suit No. 12/57 praying for grant of injunction for restraining the respondents from disturbing his possession over the suit land. The Mamlatdar by the order dated 22-9-1958 granted injunction in favour of the appellant restraining the respondents from disturbing and obstructing his possession over the suit land. Respondents Ambalal Sura and Chandulal Sura filed Tenancy Case No. 115/57 and 116/57 for declaration that the plaintiff - appellant was not tenant of the suit land u/s 70 (b) of the Bombay Tenancy and Agricultural Lands Act, 1948 in the Court of Mamlatdar. By the common order dated 29-8-1959 the Mamlatdar declared that the plaintiff was tenant of the land in dispute. The respondents filed Appeal No. 118/59 before the Dy. Collector and the Dy. Collector allowed the appeal and remanded the case to the Mamlatdar. The Mamlatdar by the order dated 28-6-1961 declared that the plaintiff - appellant was not tenant. Hence, the plaintiff - appellant preferred Appeal No. 19/61 before the Dy. Collector. The appeal of the plaintiff - appellant was dismissed by the Dy. Collector. Thereafter, the plaintiff - appellant preferred Revision Application No. 107/62 before the Revenue Tribunal. The Revenue Tribunal allowed the Revision Application of the plaintiff - appellant and held that the application filed by the respondents' ancestors were beyond limitation and the Mamlatdar has also not appreciated certain piece of evidence. Thus, the Revenue Tribunal allowed the Revision Application setting aside the order of the Dy. Collector and the order of the Mamlatdar dated 28-1-1961 whereby the plaintiff -appellant was held to be tenant of the land in dispute. The respondents filed Special Civil Applications No. 1018/62 and 1019/62 in this Court against the judgment and order of the Tribunal. The High Court remanded the matter to the Revenue Tribunal by the judgment and order dated 24-2-1969 and on remand the Revenue Tribunal held that the plaintiff - appellant was not tenant and confirmed the order of the Dy. Collector. The plaintiff No. 1 filed Special Civil Application No. 773/69 before the this Court and this Court dismissed

Special Civil Application No. 773/69 filed by the plaintiff no. 1, by the order dated 30-1-1973. The plaintiff no. 1 filed S.L.P. No. 1096/73 before the Supreme Court and the Supreme Court also dismissed the S.L.P. No.1096/73. Thus, the respondents were held to be landlords and the plaintiff no. 1 - appellant was declared to be trespasser of the land in dispute.

3. When the tenancy proceedings before the Revenue Court were pending, the respondents filed Regular Civil Suit No. 44/62 and 45/62 on 18-6-1962 before the Civil Judge for declaration that they are owners of the suit land and for possession thereof. The trial Court by the judgment and decree dated 19-2-1976 decreed the suit and held that the plaintiff appellant was trespasser and the respondents are owners of the suit property. The plaintiff - appellant filed Appeal No. 10/76 and 11/76 before the appellate Court. Both these appeals were dismissed on 29-3-1979 by the appellate Court. Thereafter, the plaintiff - appellant filed Second Appeal No. 278/78 and 279/78 before this this Court. This Court by the judgment and order dated 31-7-1978 dismissed both the said Second Appeals. The plaintiff - appellant also filed Suit No. 214/73 for declaration that he is the owner of the land in dispute by adverse possession. The suit was dismissed by the trial Court on 7-4-1979. The plaintiff filed Appeal No. 18/79 before the District Court and that appeal was dismissed by the District Court. Therefore, the plaintiff - appellant filed Second Appeal No. 453/79 before this Court and this Court also dismissed Second Appeal No. 453/79 by the judgment and order dated 16-10-1979.

4. The plaintiff - appellant filed Suit No. 134/78 before the Civil Judge for declaration that the judgment and decree passed in Civil Suit no. 44/62 is not legal one and is barred by the limitation. Hence, the same is not binding on him. That Suit No. 134/78 was dismissed on 15-12-1980. First Appeal No. 1/81 was filed before the District Court which was also dismissed on 18-9-1981. Therefore, the present Second Appeal No. 149/83 has been filed before this Court which is required to be decided on the following substantial question of law.

- (i) Whether on the facts and in the circumstances of the case the learned District Judge has erred in not appreciating the true character of the possessory suit No.12/1957, the decision rendered therein and the likely effects of the decision.

(ii) Whether on the facts and in the circumstances of the case the suit for recovery of possession have not been filed either within a period of three years from the date of order of Mamlatdar in possessory suit or within limitation u/s 29 of the Tenancy Act, the right to recover possession was extinguished.

(iii) Whether on the facts and in the circumstances of the case District Judge has erred in not properly interpreting and accepting the contention based on Article 47 of the old Limitation Act.

(iv) Whether on the facts and in the circumstances of the case the learned District Judge has erred in not holding that decree in Regular Civil Suit No. 44/1962 was obtained by the plaintiff of the said suit by practising fraud upon this appellant and the court and was therefore illegal, void, not binding and could not be enforced and executed.

(v) Whether on the facts and in the circumstances of the case the plaintiff of Regular Civil Suit No. 44/1962 practised fraud upon the appellant by suppressing fact that he was not the owner of the suit land and permitting all concern to believe that he was such a owner, obtained the decree and whether in this view of the matter the said decree could not be allowed to be executed.

5. Learned counsel for the appellant - plaintiff contended that the appellant preferred Suit No.12/57 against the respondents before the Mamlatdar Court u/s 5 (2) of the Mamlatdars' Courts Act wherein the plaintiff-appellant prayed for injunction against the respondents on the ground that he was in peaceful possession of the suit land and his possession is being disturbed by the respondents. The Mamlatdar by the order dated 22-9-1958 granted injunction in favour of the plaintiff restraining the respondents from disturbing his peaceful possession over the suit land. Under Article 47 of the Limitation Act, three years' period has been provided to file the

suit for recovery of possession of the suit premises in the order of the Mamlatdar under the Mamlatdar Courts' Act, 1906 and that limitation starts from the date of final order in the case. As suit NO.44/62 was filed on 18-6-1962 that was beyond the limitation prescribed under Article 47 of the Limitation Act, 1908 and the rights to recover possession of the property would extinguish u/s 28 of the Limitation Act. The Court has not been given any power to extend the limitation. The respondents failed to bring the suit within three years periods i.e. on or before 22-9-1961. As such, the rights to recover possession given by the Mamlatdar under the provisions of the Mamlatdars' Courts' Act will extinguish u/s 28 of the old Limitation Act. Even the plaintiff has been declared as a trespasser and the respondents in the civil proceedings have been declared as owners of the property in dispute under the law then they cannot recover the possession of the suit property from the plaintiff as their right to recover possession has already been extinguished by lapse of limitation provided under the Limitation Act. As such, the judgment and decree declaring the respondents as owners and the plaintiff as trespasser is held to be true. The respondents cannot recover the suit land. Learned counsel for the appellant contended that one Ranchhoddas had three sons; Ambalal Pravnjivan and Chandulal. Chandulal was the real owner of property bearing Survey No. 387/1/2 admeasuring three Acre in the sim of village Modasa. Respondent Ambalal claimed to be the owner of property which was owned by Chandulal on the basis of averment that, Ambalal had purchased the suit land for a consideration of Rs.6001/and that entry showing oral sale by Chandulal in favour of Ambalal was certified on 12-1-1953. However no regular valid and legal sale deed was executed by the vendor Chandulal in favour of Ambalal. The entry therefore conferred no right of ownership of the land to Ambalal Ranchhoddas by oral sale. Thus, Ambalal Ranchhoddas was not owner of the disputed property who filed Suit No. 44/62 before the Civil Judge (JD), Modasa against the appellant alleging that he was the owner of the suit land and in that suit the judgment and decree for possession was obtained by him against the appellant and the same was confirmed upto the High Court stage, the ownership is said to have transferred by the oral sale for valuable consideration. But under the provisions of Section 54 of the Transfer of Property Act and u/s 17 of the Registration Act that no oral sale can be said to be a legal and valid sale unless sale is executed in writing and registered. As such, the right of ownership conferred upon him on the basis of oral sale is illegal and against the mandatory provisions of the Transfer of

Property Act and Registration Act and is not binding on him.

6. Learned counsel for the respondent contended that the provisions of Article 47 of the Limitation Act, 1908 are not attracted in the present case. He relied on the decision of Division Bench in the case of Satwara Karsan Sava Vs. Satwara Jetha Karsan and Ors, reported in 1974 G. L. R. 142, wherein it has been held that the orders can be passed under the Mamlatdars Courts Act only u/s 5. Section 5 of the Mamlatdars Courts Act deals with restoration of possession or to give immediate possession used for agriculture, has been dispossessed or deprived thereof otherwise than due course of law. Such orders can be passed under the provisions of Section 5 (1) (b) of the Act. While section 5 (2) of the Act deals with injunction. When any attempt has been made to disturb or obstruct in possession of any land or premises used in agriculture, the Mamlatdars Court can grant temporary injunction restraining the respondents from disturbing or obstructing the possession of any person. Limitation provided under Article 47 of the Limitation Act is not applicable to the injunction granted u/s 5 (2) of the Mamlatdars' Courts Act, 1906. Limitation applies only in respect of the orders giving immediate possession or restoring the possession u/s 5 (1) (b) of the Mamlatdars' Courts Act, 1906. As such, in view of the law laid down by the Division Bench of this Court, the provisions of Section 47 of the Limitation Act, 1908 are not applicable to Suit NO.44/62 filed by the respondents and the rights of the respondents have not been extinguished due to lapse of limitation as provided under Article 47 of the Limitation Act, 1908. On the contrary, learned counsel for the appellant submitted that the decision relied on by the learned counsel for the respondent is not a Statute and that should be read in the context of the actual dispute. If the disputes and facts in the decision are different than that the decision should not be made applicable. In support of his contention he relied on the decision of the Supreme Court in the case of Prakash Amichand Shah Vs. State of Gujarat and Others, reported in AIR 1986 SC 408, wherein it has been held that the decision is not a statute or legislation but a decision of the Court. The Court should carefully ascertain the true principles laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. Learned counsel for the appellant has also relied on the decision of the Supreme Court in the case

of Municipal Corporation of Greater Bombay and others Vs. Thukrai Anjali Deokumar and others, reported in AIR 1989 SC 1194, wherein it has been held that any observation in a judgment has to be read and understood in the context of facts of that particular case in respect of which such observation has been made. Meaning thereby the contention of the learned counsel for the appellant is that the decision of the Court should not be followed blindly and it has to be carefully considered as to whether the facts and circumstances of the case in hand and the facts and circumstances of the case are exactly identical or not. If they are not identical then the law laid down in the decision will not be binding on the appellant. The facts of the decision relied on by the learned counsel for the respondents are slightly different as the dispute was with regard to the right of way to pass through Survey No. 198 belonging to the plaintiff who denied the right claimed by the defendants and obstructed them from passing through his filed. While, in the present case the appellant apprehended with regard to obstruction and disturbance from the respondent in his peaceful possession. Hence, he filed the suit for injunction restraining the defendants from making or causing any obstruction or disturbance in his legal peaceful possession and injunction was granted. Article 47 of the Limitation Act, 1908 provides three ingredients for its application namely (i) any person is bound by an order respecting the possession of immovable property, (ii) that order must have been passed under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906 and (iii) recovery of that property is needed then he has to file the suit within three years from the date of the final order in the case. In the present case the respondents were bound to respect the order with regard to possession of the appellant over the suit land and hence he filed suit bearing Suit No. 44/62 for declaration as well as for recovery of the possession. As such, the provisions of Article 47 of the Limitation Act would be applicable and the decision of the Division Bench of this Court in the case of Satwara Karsan Sava (supra) is not applicable at all to the present case. Learned counsel for the respondents has not argued in respect of the ground of ownership of Ambalal Sura.

7. I have considered the rival contentions raised by the learned counsel for the parties. I have to consider as to whether the judgment and decree passed in Regular Civil Suit No. 44/62 affirmed by the appellate Court and by this Court, is illegal and is not binding on the appellant. It is well establish that if the decree passed in any suit is illegal, null and void due to any

reason or decree can not be executed the same will not be binding the party concerned.

8. The provisions of Section 5 of the Mamlatdars' Courts Act, 1906, read as follows :

"5(1): Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdars' Court, and which shall, subject to the provisions of sections. 6 and 26, have power, within such territorial limits as may from time to time be fixed by the State Government,

(a) to remove or caused to be removed any impediment, erected otherwise than under due authority of law, to the natural flow in a defined channel or otherwise of any surface surface water, naturally rising in or falling on any land used for agriculture, grazing, trees or crops, on to any adjacent land, where such impediment causes or is likely to cause damage to the land used for such purpose or to any such grazing, trees or crops thereon."

(b) to give immediate possession of any land or premises used for agriculture or grazing, or trees or crops, or fisheries, or to restore the use of water from any well, tank, canal or water course, whether natural or artificial used for agriculture purpose to any person who has been dispossessed or deprived thereof otherwise than due course of law, or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person, not being a person who has been a farmer, owner or part owner, within a period of twelve years before the institution of the suit of the property or use claimed, or who is the legal representative of such former owner or part owner.

5 (2) : The said Court shall, subject to the same provisions, have power within said limits, where any impediment referred to in sub-section (1) is erected, or an attempt has been made to erect it, or, when any person is otherwise than by due course of law disturbed or obstructed, or when an attempt has been made so to disturb or obstruct any person in the possession of any lands or premises used for agriculture or grazing, or trees, or crops, or fisheries, or in

the use of water from any well, tank, canal or water-course, whether natural or artificial, used for agricultural purposes, or in the use of roads or customary ways tracks, to issue an injunction to the person erecting or who has attempted to erect such impediment, or causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from erecting or attempting to erect any such impediment or, from causing or attempting to cause any further disturbance or obstruction."

9. According to the learned counsel for the respondent, this case would fall under Section 5 (2) of the Mamlatdars' Courts Act, 1906 as in this case injunction has been issued in favour of the appellant plaintiff. Article 47 of the Limitation Act is not attracted to the injunction issued under Section 5 (2) of the Mamlatdars' Courts Act, 1906. Suit No. 12/57 was not for restoration or immediate possession as such suit No.44/62 is not barred by the provisions of Article 47 of the Limitation Act as propounded by the aforesaid decision of the Division Bench of this Court.

10. Learned counsel for the appellant contended that it is also a well settled rule of law that the decision should not be considered as statute and it should not be blindly applied but it should be considered as to what was issue for determination in that case and whether the facts and circumstances of the case of that decision and the facts and circumstances of the case in hand are identical in order to apply the decision in the case in hand. Learned counsel for the appellant relied on the decision of the Supreme Court in the case of Prakash Amichand Shah Vs. State of Gujarat and others, reported in AIR 1986 SC 468, wherein it has been held as under :

"A decision ordinarily is a decision on the case before the Court while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Hence, while applying the decision to a latter case, the Court which is dealing with it should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation."

11. It is further pointed out by the learned counsel for the appellant that the Supreme Court has also held in the case of Municipal Corporation of Greater Bombay Vs. Thukrai Anjali Deokumar and others, reported in AIR 1989 SC 1194, that any observation in a judgment has to be read and understood in the context of facts of that particular case in respect of which such observation has been made.

12. I have gone through the decision of the Division Bench of this Court in the case of Satwara Karsan Sava (supra). In that case, there was dispute between the plaintiff and the defendant no. 2 and 5 with regard to right of way to pass through the land survey No. 198 belonging to the plaintiff. The plaintiff denied the right of way claimed by the defendants no.2 and 5 and obstructed them from passing through the field. The Mamlatdar granted injunction restraining the plaintiff from obstructing the defendants from passing through the field in question. Thus, it was not a case with regard to the possession while In the present case, the appellant plaintiff was holding peaceful possession of the property in dispute. He apprehended disturbance and obstructions being created by the respondents. Hence he filed Suit No.12/57 before the Mamlatdars Court u/s 5 (2) of the Mamlatdars' Courts Act, 1906. Mamlatdars' Court granted injunction in favour of the plaintiff restraining the respondents from disturbing and obstructing his possession over the suit land by the order dated 22-2-1958. It would be very unreasonable and irrational that the person has already been dispossessed and if he has been restored to the possession under Section 1 (b) of the Mamlatdars' Courts Act, 1906. The suit would be barred under the provisions of Article 47 of the Limitation Act and if he apprehends disturbance or obstruction from the respondents in his peaceful possession he files possessory suit for grant of injunction restraining defendants - respondents from making obstruction and causing disturbance in his peaceful possession over the disputed property and if such suit is for injunction, then the provisions of Article 47 of the Limitation Act would not be applicable. As the Division Bench of this Court has not considered the matter in respect of injunction restraining the the appellant plaintiff from disturbing or obstructing the defendants in that case. The main consideration considered in that case was in respect of the right of way of the defendant no. 2 and 5 over the property of the plaintiff - appellant. Hence, this question regarding possession being disturbed has not been effectively considered by the Division Bench of this

Court in the case of Satwara Karsan Sava in that respect and before the Division Bench of this Court the main question was in respect of right of way under Section 5 (2) of the Mamlatdars' Courts Act and it was casual observation that an order regarding possession can be passed u/s 5 (1) and not u/s 5 (2) of the Mamlatdars' Courts Act though the powers u/s 5 (2) are subject to powers u/s 5 (1) of the Act. As such, the facts and circumstances of that case would not be applicable in the present case regarding observation that injunction issued under Section 5 (2) of the Mamlatdars' Courts Act even in the case for respecting the possession of immovable property by injunction would not be barred under the Limitation Act inasmuch as it is also observed in that judgment, " It is thus evident that this is not suit arising from an order binding the plaintiff in regard to the possession of immovable property. It arises in connection with an injunction granted by the Mamlatdar under the Mamlatdars' Courts act". It is further observed, "Now, the Mamlatdars' Courts Act contemplates two types of orders, one respecting the possession of immovable property and the other in respect of injunction restraining a party from obstructing a right of way claimed by his opponent." The dispute, facts and circumstances of that case and the dispute, facts and circumstances of the present case are entirely different and in view of the decision of the Supreme Court the Court should be cautious to apply the earlier decision if the decision is in respect of the disputed fact and the facts and circumstances of the are exactly identical and similar then the decision should be applied. In my opinion, observation in the decision of the Division Bench of this Court in the case of Satwara Karsan Sava (supra) regarding all the matters including the orders restraining the other side from creating or making obstruction or disturbance in possession which amounts to order respecting possession of immovable property would not fall in the category of the cases mentioned in Section 5 (2) for nonapplication of Article 47 of the old Limitation Act, 1908. In my opinion, Article 47 of the old Limitation Act would bar the civil suit No.44/62 and rights of the respondents would stand extinguished u/s 28 of the old Limitation Act.

13. So far as the ownership of Ambalal Sura over the land in dispute is concerned, there is nothing on record to show that he purchased the land from his other brother Chandulal Sura by a registered sale deed for valuable consideration. From the judgment, it appears that he had purchased the suit property by an oral sale for Rs.6001/and the revenue entry was certified on 12-1-1953.

Sale of immovable property not executed u/s 54 of the Transfer of Property Act and not registered u/s 17 of the Registration Act, is illegal and is not a sale in law. If the sale was illegal, null and void in the eye of law the respondent Ambalal Sura would not become legal owner of that property as a result of oral sale and he cannot claim that the property is of his ownership and as such the suit filed by him in respect of that property claiming to be owner thereof is illegal, null and void. The respondents have not replied to this argument. In view of the contentions of the learned counsel for the respondent that the property will be deemed to be of the ownership of Ambalal Sura has no force in the eye of law. The decree declaring Ambalal Sura as owner of the property on the basis of oral sale by Chandulal Sura is nullity, invalid, illegal and nonexecutable in the eye of law.

14. Considering the facts and circumstances of the case, submissions made by the learned counsel for the parties, in my opinion the right of the respondents decree in Suit No. 44/62 to recover possession of the land in question would be barred under the provisions of Article 47 of the old Limitation Act and their rights to recover the possession of the suit property in dispute have extinguished in view of the provisions of Section 28 of the Limitation Act. As such the judgment and decree passed by the Courts below are liable to be quashed and set aside and the decree of civil suit No. 44 of 1962 will not be binding on the plaintiff - appellant and cannot be executed for possession.

15. Accordingly, this appeal is allowed and the substantial question of law with regard to limitation is decided in favour of the appellant - plaintiff no. 1 and the judgment and decree dated 6-3-1982 by the Civil Judge (JD), Modasa in Regular Civil Suit No. 134/78 and confirmed by the judgment and decree dated 27-8-1982 passed by the District Judge, Himatnagar in Regular Civil Appeal No.20/1982 are quashed and set aside and Regular Civil Suit No.134 of 1978 filed by the plaintiff appellant in the concerned Court of Civil Judge, would stand decreed. There shall be no order as to costs.

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/JVSatwara/